IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Crl.R. No.80 of 1990

Date of Decision: 14.3.2007

Jagdish Kumar s/o Bihari Lal

....Petitioner.

Versus

State of Punjab.

...Respondent.

Present:- Mr.Shiv Raj Angi,Advocate for
Mr.K.K.Goyal, Advocate
for the petitioner.

Mr.Gurinder Singh Bhandari, DAG Punjab
for the respondent.

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S.S.SARON, J.(ORAL)

This revision petition has been filed against the order dated 6.2.1990 passed by the learned Additional Sessions Judge, Ludhiana, whereby the appeal filed by the petitioner against the judgment and order dated 3.7.1989 passed by the learned Judicial Magistrate Ist Class, Ludhiana, has been dismissed. The learned Trial Magistrate vide his judgment and order dated 3.7.1989 convicted the petitioner for the offence under Section 9 of the Opium Act and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.2000/-. In default of payment of fine the petitioner was to under rigorous imprisonment for a further period of six months.

Case FIR No.237 dated 10.8.1985 for the offence under Section 9 of the Opium Act was registered against the petitioner at P.S.City Kotwali, Ludhiana. ASI Mitter Sain was posted at Police Station City Kotwali and on 10.8.1985 he along with other police officials was going near the Kamla Nehru Market on patrol duty. The petitioner Jagdish Kumar was seen coming from the railway station side. He on seeing the police party tried to turn back. On account of the suspicion raised he was apprehended. On his search a "Dibba" tin (box) containing Opium weighing 4 kgs was found on his person. Sample of 5 grams was separated from the recovered Opium. The remaining Opium was kept in the dibba tin. The dibba tin and the sample were sealed with the seal bearing impression `MS' and were taken in possession by the police, in pursuance of recovery memo which was attested by ASI Ranjit Singh and Constable Satnam Singh. The Investigating Officer sent the ruqa (memo) Ex-PC to the police station on the basis of which formal FIR Ex-PC/1 was registered. The police investigated the matter. A rough site plan with correct marginal notes Ex-PD was prepared. On return to the police station the case property was deposited with the MHC with the seals intact. The sample of the recovered Opium was sent by the MHC to the Chemical Examiner who found the same to contain Opium. After completing the investigation the charge report (challan) was filed against the petitioner in the Court of the learned Chief Judicial Magistrate, Ludhiana on 12.2.1986. Thereafter, the case was transferred to the Court of learned Judicial Magistrate Ist Class, Ludhiana. The learned Trial Magistrate vide order dated 2.4.1986 found a prima-facie case to be made out under Section 9 of the Opium Act against the petitioner. Accordingly, he was charged for the said offence to which he pleaded not

guilty. The prosecution in order to prove its case examined SI Mitter Sain-PW1, ASI Ranjit Singh-PW2, HC Samsun-PW3, Hardev Singh Constable-PW4 besides documents and formal affidavits were tendered in evidence. The statement of the petitioner in terms of Section 313 of the Code of Criminal Procedure Code (`Cr.P.C.' for short) was recorded in which he denied the substance of the evidence that was put to him. The learned Trial Magistrate after considering the evidence and material on record convicted and sentenced the petitioner to one year rigorous imprisonment and fine of Rs.2000/-. Against the said order, the petitioner filed an appeal before learned Sessions Judge, Ludhiana. The learned Additional Sessions Judge, Ludhiana, to whom the appeal was entrusted dismissed the same on 6.2.1990. The said order as already noticed is assailed in the present petition.

Learned counsel appearing for the petitioner submits that the place of recovery i.e. Kamla Nehru Market is situated on the G.T. Road which is the busiest road and despite that no independent witness was joined. Even otherwise there are discrepancies in the statements of witnesses that have been examined. In any case the same have wrongly been taken to be minor discrepancies by the learned Courts below. It is also submitted that the affidavits Ex.PE and PF have not been properly verified as mandated by law. Besides, there is no evidence to the effect as to how five grams of Opium was separated from the bulk as no witness has stated that they were carrying weights of 5 grams.

In response learned counsel for the State has submitted that the case against the petitioner has been proved in all material aspects. Merely because independent witnesses have not been joined is no ground to discard

the sworn testimony of Mitter Sain PW1 and Ranjit Singh ASI-PW2. It is stated that there is no enmity of the said witnesses against the petitioner so as to falsely implicate him. Therefore, the evidence is liable to be accepted and the revision petition merits dismissal.

I have given my thoughtful consideration to the respective contentions of the learned counsel appearing for the parties and perused the paper book.

The prosecution in order to prove its case examined Mitter Sain ASI as PW1. At the time of making his deposition in the Court he supported the prosecution case in all its material particulars. It is stated by ASI Mitter Sain, retired, that on 10.8.1985 he was posted at Police station Kotwali, Ludhiana, and he along with ASI Ranjit Singh, Constable Satnam Singh, Constable Gurdev Singh, Constable Suresh Kumar etc were patrolling the area. The accused who was present in Court, had come from the railway station side and on seeing the police party tried to turn back. He was apprehended and searched. On his search the contraband Opium was recovered. Five grams of the recovered Opium was separated as sample. The prosecution witness Mitter Sain ASI was cross-examined at considerable length. However, his testimony could not be shaken. ASI Ranjit Singh-PW2 has also supported the case of the prosecution in all material aspects. It is not shown that the police officials who investigated the case were in any manner inimical towards the petitioner. Both the Courts below have accepted the sworn testimonies of the witnesses and there is no reason to disbelieve the same especially when Mitter Sain had deposed in the case after his retirement, when it cannot be said that he was interested in success of the prosecution case. The facts that the affidavits

Ex-PE and PF have not been verified in accordance with the procedure mandated by law are also of not much consequence. Ex-PE is the affidavit of Samsun Head Constable, who was the incharge of the malkhanna (MHC). It is verified by him that the contents of the affidavit as per his knowledge were true and correct. Similarly, the affidavit Ex-PF is that of constable Hardev Singh and it is stated that the contents of the affidavit are true and correct to his knowledge. In any case whatever defect that may be there in the affidavits of the witnesses namely Samsoon HC and Hardev Singh Constable is not of any significance as their statements on oath were recorded as PW3 and PW4 respectively. A perusal of the order dated 2.3.1989 passed by the learned trial Magistrate shows that an opportunity was given to the accused to cross examine them but no question was put to them. Later an application was filed for recalling the said witnesses for cross examination as counsel for the accused was absent. It was observed that non availability of the counsel does not afford a ground for reopening the case by summoning the witnesses for cross examination. Accordingly, the application was declined. The order passed on 2.3.1989 is not shown to have been further assailed. In the circumstances it cannot be said as to how the said affidavits are in any manner improper which would warrant interference against the order passed by the Courts below, therefore, the fact that no independent witness was joined in the facts and circumstance of the present case is also not of much significance as the prosecution has proved its case on the basis of depositions made by Mitter Sain ASI-PW1 and Ranjit Singh ASI-PW2. The non-joining of any independent witness in the facts and circumstances of the present case has also been considered by the learned Additional Sessions Judge. It was observed that it must be held that

the evidence of PW-1 and PW-2 cannot be thrown out lock stock and barrel simply on account of their official status, nor the non joining of independent witness becomes fatal to the prosecution case. The Chemical Examiner Report Ex-PD has clearly opined that the recovered contraband was Opium. The said report has not been challenged by the accused. The fact that it is not shown as to how 5 grams of Opium was separated is also quite inconsequential as it was merely that some pinch of the Opium was taken as sample for the purpose of sending it to the Chemical Examiner, who admittedly has found the sample to contain Opium. Therefore, the circumstances recorded by the Courts below in recording a finding of guilt are sound.

Learned counsel for the petitioner has however submitted that keeping in view the fact that the petitioner was sentenced to one year imprisonment almost 17 years ago, it would be futile to send him to custody at this stage. Therefore, the petitioner is entitled to the benefit of probation under the provisions of the Probation of Offenders Act as also Section 360 of the Code of Criminal Procedure. I find merit in the said contention of the learned counsel for the petitioner. It is no doubt that a period of 17 years has since lapsed and it would be improper to send the petitioner to custody at this stage. This is more so for the reason that it has not been shown that the petitioner has thereafter also indulged in similar activities. The petitioner was arrested in the case on 10.8.1985 and was granted bail on 22.8.1985. He was released on 27.8.1985. After his conviction by the learned Additional Sessions Judge, on 6.2.1990, he was granted bail by this Court on 14.2.1990. Therefore, at this stage it would be highly improper to send him to custody and he is entitled to the benefit of grant of probation.

Consequently, this petition is disposed of and the sentence imposed on the petitioner in terms of the order passed by the Courts below while maintaining the conviction is modified to the effect that the petitioner shall be released on probation for a period of one year on his executing bond in the sum of Rs.20,000/- to the satisfaction of the learned trial Court undertaking to keep peace and be of good behaviour and to receive the sentence as and when called upon during the said period.

(S.S.SARON)
March 14,2007 **JUDGE**
Reema